

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Business Data Services in an Internet)	WC Docket No. 16-143
Protocol Environment)	
)	
Investigation of Certain Price Cap Local)	WC Docket No. 15-247
Exchange Carrier Business Data Services)	
Tariff Pricing Plans)	
)	
Special Access for Price Cap Local Exchange)	WC Docket No. 05-25
Carriers)	
)	
AT&T Corporation Petition for Rulemaking to)	RM-10593
Reform Regulation of Incumbent Local)	
Exchange Carrier Rates for Interstate Special)	
Access Services)	

REPLY COMMENTS



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EXECUTIVE SUMMARY

At the outset of the Further Notice of Proposed Rulemaking “(FNPRM)”, the Commission stated that “competition is best.” ACA agrees. Further, the Commission has recognized – and all evidence indicates – that by putting in place the proper “regulatory incentives,” the Commission can lower the cost of entry and drive the development of competition. For nearly four decades, the Commission has adhered to that principle and has applied a light touch regulatory regime to non-dominant (effectively non-incumbent) Business Data Service (“BDS”) providers. As ACA and others demonstrated in their initial comments, this approach has been remarkably successful in driving BDS investment, innovation, and competition. And there is no reason commercial customers should not be able to continue to reap the significant benefits of this time-tested approach, assuming the Commission does not fundamentally alter its regulatory direction.

Yet, in this proceeding, reversing course is exactly what the Commission is considering. Despite its successful non-dominant regulatory approach, the Commission is inexplicably undermining what has been and will continue to be achieved through new and additional private investment by considering imposing rate regulation on non-incumbents in non-competitive markets. The record demonstrates that the cost of regulating non-incumbents will far outweigh any benefits and will undermine the Commission’s goal to create competition. As such, the Commission has no record upon which to base changing course. Rather, the Commission should maintain, and in fact enhance, its present light touch regime by facilitating additional entry. To that end, the Commission should focus on freeing BDS customers from incumbent lock-in provisions and other onerous terms to choose non-incumbent providers, lowering barriers to deployment, and not imposing burdensome regulatory compliance requirements.

Finally, ACA notes that in a filing today, the two proponents of instituting rate regulation of non-incumbent providers, Verizon and INCOMPAS, propose that “[n]ew entrants would not be subject to the [Ethernet service] benchmark at least until FCC reassesses market competition in approximately three years.” However, this proposal is insufficient. First, there is no economic or legal basis to regulate the provision of BDS or BDS-like services provided by non-incumbents in non-competitive areas. Second, any potential regulation that might be imposed would create uncertainty for non-incumbents, deterring their investment and the development of competition – an outcome that does not serve the public interest. Accordingly, on this point, the proposal of Verizon and INCOMPAS should be rejected.

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REPLY COMMENTS



The American Cable Association¹ (“ACA”) hereby submits reply comments in response to the Further Notice of Proposed Rulemaking in the above-referenced dockets.²

¹ ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. Many of these providers offer broadband data services (“BDS”), and most others are considering offering BDS. In these comments, we use the term “cable operator or provider,” “competitive provider,” or “non-incumbent local exchange carrier, carrier, or provider” to refer to providers competing with the incumbent local exchange carrier in their territory.

² *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) (“Tariff Investigation Order” or “FNPRM”).

I. INTRODUCTION

As in its initial comments, ACA focuses herein on the value of the Federal Communications Commission (“Commission”) maintaining its longstanding policy of applying a light regulatory touch to the provision of BDS (also known as special access) by non-incumbent local exchange carriers (“LECs”). In brief, the record, with virtually no comment to the contrary, demonstrates that this policy has been remarkably successful in driving investment, innovation, and competitive pricing in the BDS market, is based in sound economic and antitrust precepts, and produces rates that are just and reasonable and not unjustly or unreasonably discriminatory. Further, should the Commission err and apply its proposed *ex ante* rate regulation³ to non-incumbent LECs, the comments leave no doubt that it would act as a “tax” that would undermine the Commission’s efforts to bring about BDS competition. In sum, the Commission’s decision decades ago to apply a light touch regulatory policy to non-incumbents has borne (and continues to bear) fruit, and there is no material support in the record to justify changing course. ACA agrees with the comment of the economist, Joseph Farrell, in his Declaration attached to the Comcast Comments: “[T]he Commission has multiple plausible opportunities to strengthen competition rather than replacing it, and likely undermining it, through pervasive price regulation ... where competition is already workable or entry is

³ See e.g., FNPRM, ¶ 8. The Commission proposes the “end of tariffing in the BDS marketplace” and seeks to regulate rates in non-competitive markets by use of price caps for TDM BDS and benchmark/anchor pricing for Ethernet BDS. As discussed later in these comments, proponents of regulation contend this approach will not work and that price regulation can only be effective if tariffing is retained. For instance, Level 3 Communications stated in a recent *ex parte* filing, “There appears to be no viable alternative to tariffs under the Communications Act.” See Letter from Thomas Jones, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 16-143 *et al.* at 5 (July 25, 2016) (“Level 3 *Ex Parte*”). This view is shared by large purchasers of BDS. See Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 16-143 *et al.* at iii (July 13, 2016) (“Ad Hoc Comments”).

plausible, those opportunities should be the priority.”⁴ So, the Commission has a path forward: not only maintain its pro-entry regulatory regime, but enhance it, by freeing customers to move to competitive providers, by tearing down barriers to deployments, and by minimizing any regulatory compliance burdens.

Finally, ACA notes that in a filing today, the two proponents of instituting rate regulation of non-incumbent providers, Verizon and INCOMPAS, propose that “[n]ew entrants would not be subject to the [Ethernet service] benchmark at least until FCC reassesses market competition in approximately three years.”⁵ However, this proposal is insufficient. First, as explained at length herein, there is no economic or legal basis to regulate the provision of BDS or BDS-like services provided by non-incumbents in non-competitive areas. Neither Verizon nor INCOMPAS counter that fact in their filing. Second, any potential regulation that might be imposed would create uncertainty for non-incumbents, deterring their investment and the development of competition – an outcome that does not serve the public interest. So, while Verizon and INCOMPAS appear to recognize their initial proposal on regulating non-incumbents was flawed, their new offer still holds out the possibility that unwarranted and counterproductive regulation will be imposed on non-incumbents. Accordingly, on this point, it should be rejected.⁶

⁴ Comments of Comcast Corporation, Declaration of Joseph Farrell, WC Docket No. 16-143 et al., ¶ 32 (June 28, 2016) (“Farrell Declaration”).

⁵ Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al.* at 2 (Aug. 9, 2016).

⁶ In these comments (*see* Section VII, *infra*), ACA explains that the Commission’s previous data collection imposed onerous burdens on smaller BDS providers, and it seeks an exemption for these providers from further proposed collections. Accordingly, assuming *arguendo* that the Commission adopts the latest Verizon/INCOMPAS proposal, smaller providers should not be subject to any data collection that might stem from it.

II. APPLYING A LIGHT TOUCH REGULATORY REGIME ON NON-INCUMBENT PROVIDERS HAS PROVEN REMARKABLY SUCCESSFUL IN DRIVING INVESTMENT, INNOVATION, AND COMPETITIVE PRICING IN THE BDS MARKET

In its initial comments, ACA explained that the Commission's almost four decade old light touch regulatory regime for non-dominant providers has been premised on the concept that it drives investment, innovation, and competition.⁷ All the evidence in the record in this proceeding bears out that premise. For instance, in the FNPRM, the Commission remarked that "[t]he great entry success has been that of cable."⁸ In addition, the Rysman Paper noted that almost 500 providers submitted information for the Commission's 2015 Data Collection and that of the approximately 490,000 buildings in the US served with fiber, non-incumbent competitive providers had deployed to about 50 percent of these.⁹ In its initial comments, ACA provided additional facts about the success of the Commission's approach in the BDS market, noting that smaller competitive providers:

- Are investing at least tens of millions and upwards of \$300 million annually to deploy facilities to support the provision of BDS¹⁰ and additional time and resources to better service customers; and
- Have decreased their BDS prices by approximately 50 percent on average across all geographic areas and all customer segments – with some prices decreasing even more, by 70 percent.¹¹

⁷ Comments of the American Cable Association, WC Docket No. 16-143 *et al.*, at 9-21 (June 28, 2016) ("ACA Comments").

⁸ FNPRM, ¶ 236. The Commission also touts the value of entry at the beginning of the FNPRM, ¶ 2 ("the marketplace has been changing. Cable companies have entered the market, supplementing the BDS offerings of both traditional incumbent local exchange carriers (incumbent LECs) and competitive local exchange carriers (competitive LECs).").

⁹ FNPRM, App'x B at 221, 223.

¹⁰ ACA also demonstrated these investments compare favorably to investments by other, larger non-incumbents.

¹¹ The reductions in price are due largely to smaller providers reducing their margins to respond to increased competition and not because of any material reduction in the cost of deployment for fiber-based BDS. (To provide a point of reference, the FNPRM estimates that the price cap regulation would have resulted in a reduction in prices ("Price Cap Reset") of between 2.21 percent and 20.43 percent over a 10

Other parties provided further evidence of the benefits of a light touch regulatory approach. The following is a mere sampling of these comments:¹²

- “Cable companies...installed more new retail Ethernet ports than the large ILECs during the first half of 2013.”¹³
- “Ethernet growth has been coupled with price declines...monthly recurring revenue for Ethernet services in the 10 to 100 Mbps range declined by 7.6%, fraction GigE Ethernet (101 to 1000 Mbps) declined by 17.4% and prices for full 1 GigE declined by 12.1%.”¹⁴
- “Level 3 aims to deploy connections to between 3,000 and 4,000 new locations per year.”¹⁵
- “Mediacom’s network supports, among other things, backhaul for over 1000 wireless provider macro cell sites, many of which are in rural Iowa.”¹⁶

year period. FNPRM, App’x C, Table 6 at 248. As another point of reference, the proposal of INCOMPAS and Verizon going forward would result in a 16 percent price reduction over the next five years. See Letter from Chip Pickering, INCOMPAS, and Kathleen Grillo, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al.* (June 27, 2016).)

¹² See *also* Letter from Eric J. Branfman, Counsel for Lightower, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al.*, Attachment at 2 (August 1, 2016) (“Lightower *Ex Parte*”) (“Since 2013 we have investment approximately one billion dollars (\$1,000,000,000) in building out fiber networks – almost all last mile or ‘metro’...Our capital expenditures are approximately 45% of our revenue – compared to teens for Verizon, CenturyLink, Level 3 and others.”).

¹³ Comments of the National Cable & Telecommunications Association, WC Docket No. 16-143 *et al.* at 4 (June 28, 2016) (“NCTA Comments”). See *also* Joint Comments of CenturyLink, Inc. *et al.*, WC Docket No. 16-143 *et al.* at 18 (June 28, 2016) (“CenturyLink Comments”) (“AT&T, Verizon, and CenturyLink the three largest ILECs, collectively accounted for only 47 percent of Ethernet service revenue in the first half of 2013.”).

¹⁴ NCTA Comments at 5. See *also* CenturyLink Comments at 24 (“the average monthly pricing for Ethernet private line and Ethernet virtual private line services has declined each year from 2011 to 2015.”); Comments of Comcast Corporation, WC Docket No. 16-143 *et al.* at 18 (June 28, 2016) (“Comcast Comments”) (“The high and increasing level of competition in the wholesale and retail BDS marketplaces has had a predictable effect on prices, which have been declining substantially for several years.”).

¹⁵ Comments of Birch, Earthlink, and Level 3, WC Docket No. 16-143 *et al.* at n. 5 (June 28, 2016) (“Birch Comments”).

¹⁶ Comments of Mediacom Communications Corporation, WC Docket No. 16-143 *et al.* at 2 (June 28, 2016).

- “Cox provides retail fiber-based BDS to thousands of individual businesses, governmental agencies, schools, and health care facilities.”¹⁷
- “Purchasers of BDS confirm the continued growth of competition in BDS in recent years. AT&T has documented that when purchasing services outside of its ILEC territory it is now able to choose from a number of alternative suppliers, including CLECs, cable companies, and fixed wireless providers, and AT&T uses all of these options for both mobile backhaul and for the broadband services it offers to business customers.”¹⁸

In contrast to these testaments to the value of the applying light touch regulation to non-incumbents, ACA was unable to unearth even a shred of evidence from any commenting party, much less from the FNPRM, that this regulatory approach has been flawed – that it did not drive investment, innovation, and competition or that it somehow led to or facilitated anticompetitive unilateral or collusive effects. In addition, no party supporting the imposition of rate regulation on non-incumbents explored, let alone sought to refute, the harm to investment, innovation and competition that, as ACA discusses below, would result from imposing even *ex ante* rate regulation on these competitive providers. Finally, ACA notes that, in their comments, large purchasers of BDS do not contend “light touch” regulation of non-incumbents is a source of any problem in the market, and they do not seek to regulate non-incumbents.¹⁹ Rather the sole focus of these purchasers is on unreasonable ILEC prices and the re-imposition of rate regulations on these incumbents to address that problem.

¹⁷ Comments of Cox Communications, Inc., WC Docket No. 16-143 *et al.* at 10 (June 28, 2016) (“Cox Comments”).

¹⁸ Comments of AT&T Inc., WC Docket No. 16-143 *et al.* at 16 (June 28, 2016).

¹⁹ See *generally* Ad Hoc Comments.

III. NO COMMENTING PARTY CONTRADICTED ACA AND PROVIDED A COGENT ECONOMIC RATIONALE FOR REGULATING THE RATES OF NON-INCUMBENT PROVIDERS OF BDS

In its initial comments, ACA included an Economists' White Paper by Drs. Marius Schwartz and Federico Mini that explained that the Commission's non-dominant regime is rooted in sound and compelling economics since it provides entrants with incentives to commit effort, initiative, and financial investment and avoids needlessly burdening them with regulation when the ultimate policy goal is its elimination.²⁰ Further, these economists noted that this approach underlies the U.S. antitrust principle that if a firm attains its presence in the market, even monopoly, through legitimate means (e.g. not a monopoly franchise right), it should not find its pricing restricted.²¹ Hence, because cable and other competitive providers' investments to provide BDS have and are being made without any government grant of a monopoly, any Commission action to regulate cable providers or other non-incumbents based on their attaining market power²² would be contrary to sound economics and antitrust policy.²³

²⁰ ACA Comments, Appendix A.

²¹ As the Department of Justice Antitrust Division explains, "[t]he long-standing requirement for monopolization is both '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" U.S. Department of Justice, "Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act: Chapter 1 https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_4_ (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (last updated June 25, 2015)).

²² It also would be contrary to sound economics and antitrust policy for the Commission to regulate non-incumbents based their having attained some threshold market share or network coverage.

²³ Other commenting parties echoed the work of ACA's economists. For instance, in the Comcast Comments, Professor John W Mayo explained that the "economic consequences [of regulating non-incumbents] would be perverse...retard[ing] economically desirable investment by competitive firms." Comcast Comments, Declaration of John W. Mayo, ¶ 102.

No commenting party set forth a cogent rationale that contradicted the economic and antitrust reasoning of Drs. Schwartz and Mini.²⁴ CenturyLink *et al.* attempted to provide an economic rationale for regulating non-incumbents by averring that “regulatory parity” warranted such regulation.²⁵ They supported their contention by citing only a 1990 filing by the U.S. Department of Justice in the Commission’s proceeding to review competition in the interstate interexchange market.²⁶ In this filing, the Department stated that “applying different degrees of

²⁴ Most noteworthy, neither INCOMPAS nor Verizon, the two parties that proposed the new regulatory framework on which the Commission appears to rely, provided any economic support in their comments for regulating the BDS rates of non-incumbents in non-competitive areas. Comments of INCOMPAS, WC Docket Nos. 16-143 *et al.* (June 28, 2016), and Comments of Verizon, WC Docket Nos. 16-143 *et al.* (June 28, 2016) (“Verizon Comments”). Supporters of this framework also provided no economic justification for regulating non-incumbents. See e.g. Comments of Sprint Corporation, WC Docket Nos. 16-143 *et al.* (June 28, 2016) (“Sprint Comments”) and Comments of Public Knowledge *et al.*, WC Docket Nos. 16-143 *et al.* (June 28, 2016). See also, Birch Comments at 58-60. Birch *et al.* set forth a novel approach to regulating “the single leading competitor in a non-competitive market,” but they provided no economic support for this approach, only stating that it was required “to ensure that its regulatory regime is technology-neutral and service provider-neutral” and “applying *ex ante* rate regulation to the leading competitor in the relevant market should have the effect of ensuring that all firms that compete in the relevant market charge reasonable prices.” *Id.* at 58-59. At the same time, Birch *et al.* add that “it may be affirmatively harmful to apply *ex ante* regulation to non-leading competitors” because it will impose additional compliance costs on them and make it “more complex and likely less effective” to design *ex ante* rate regulation. *Id.* at 59.

Finally, in discussing which providers should be regulated and how they should be regulated, the comments and filings of competitive providers that support the INCOMPAS/Verizon are especially tortured: they only raise competitive concerns about incumbents while espousing the need to regulate non-incumbents in non-competitive markets. Several of their recent filings demonstrate this point. Level 3 Communications, in a recent lengthy *ex parte* filing, expresses repeatedly concerns only about anti-competitive activities of incumbent providers and makes no mention of non-incumbents. See Letter from Thomas Jones, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 16-143 *et al.* (July 27, 2016). In addition, proponents of regulation, in proposing methods by which the Commission should regulate rates, base them on or otherwise refer to price cap regulation of incumbents without explaining how price caps would be established for non-incumbents. See, e.g., Level 3 *Ex Parte* at 4 (“price caps have been in place for decades and are well understood”); Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al.* at 6 (July 25, 2016) (“Windstream *Ex Parte*”) (a TDM-based pricing benchmark would “anchor Ethernet rates in non-competitive markets to TDM price caps.”).

²⁵ CenturyLink Comments at 67. See also Verizon Comments at 18, where Verizon made a similar argument (“Requiring some competitors to operate as common carriers, but not others that offer comparable services, would confer unfair competitive advantages and distort the marketplace.”).

²⁶ CenturyLink Comments at 67, n. 245.

regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals.”²⁷ ACA does not disagree with the Department’s statement about “unwarranted” regulatory burdens; however, as ACA explained in its comments, regulation is warranted where a provider has market power resulting from a grant of monopoly rights from the government, and regulation should be reduced when that market power is diminished. The Commission followed that approach in issuing its decision in the *Competition in the Interstate Interexchange Marketplace* proceeding: maintaining regulation of incumbents where they still had market power and reducing it where competitive entry had diminished that market power – but at no time did the Commission even consider imposing new regulation on competitive providers since it was not warranted.²⁸ In sum, ACA agrees that it is apt to use the Department of Justice’s position to support deregulation of incumbents when their market power is diminished, as well as not to impose regulation of competitors to expedite entry and the development of competition.

Verizon in its comments seems to suggest another economic rationale for regulating non-incumbents. It claims that cable operators providing BDS should be regulated because they are refusing to provide that service to Verizon based on “anticompetitive motivations” stemming from competing with Verizon in the wireless market.²⁹ Verizon’s reasoning is

²⁷ *Id.*, citing Reply Comments of the U.S. Department of Justice, CC Docket No. 90-132 at 26 n. 42 (filed Sept. 28, 1990).

²⁸ ACA’s interpretation of the Department’s position is demonstrated by CenturyLink’s reliance on the Department’s statements to support its 2006 petition for forbearance from various regulations (that is, where CenturyLink sought parity through deregulation). See Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 06-125 and 05-333, Attachment at 8 (Sept. 28, 2006). In other words, ACA submits that CenturyLink’s appeal for parity in this proceeding is really an appeal for CenturyLink to be deregulated and not for regulation of competitive providers.

²⁹ Verizon Comments at 17-19.

specious, running counter to antitrust precepts.³⁰ It is a settled matter in the antitrust canon that refusals to deal are only considered anticompetitive when a firm has market power and maintains that power through improper means or leverages that power in an attempt to gain market power in another market.³¹ That clearly is not the case here since cable operators do not have market power in the provision of BDS. As a result, no cable operator has any incentive or ability to act anti-competitively in the provision of BDS.

IV. NO COMMENTING PARTY PROVIDED A COGENT RATIONALE OR SUFFICIENT EVIDENCE TO INDICATE THAT NON-INCUMBENT ETHERNET RATES ARE NOT JUST AND REASONABLE

ACA set forth in its initial comments two principal reasons why the Commission should not be concerned that non-incumbents will offer BDS in non-competitive areas at rates, terms, and conditions that are not just and reasonable and are unjustly or unreasonably discriminatory. First, ILECs offer BDS ubiquitously. They are subject to dominant carrier regulation today where sufficient competition does not exist; should the Commission determine it necessary in this proceeding, they would be subject to some form of rate regulation in non-competitive areas. Customers thus could obtain incumbent-provided BDS that are just and reasonable and not unjustly or unreasonably discriminatory.³² Second, non-incumbents need to offer better rates, terms, and conditions than ILECs to sign up commercial customers, who are generally sophisticated purchasers – and market evidence supports this conclusion.

³⁰ Verizon also fails to submit evidence beyond a single dispute with a cable operator, and, even then, it provides limited facts about the matter.

³¹ See Federal Trade Commission, “Refusal to Deal,” <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal> (last viewed Aug. 8, 2016).

³² ACA Comments at 6-7. See also Lighttower *Ex Parte*, Attachment at 4 (“Lighttower cannot sell at a price higher than ILEC unless it offers compensating value, such as guarantees of higher quality.”) and at 5 (“Pricing for all Lighttower offerings has been falling for years – whether calculated on a per megabit or other basis.”).

Other parties supported the conclusion that rates charged by non-incumbents are invariably just and reasonable. Cox Communications, for instance, explained that competitive BDS providers cannot impose unjust and unreasonable rates because if they attempt “to assess rates higher than the dominant provider, the ILEC, the customer could always go back to the ILEC.”³³ Cox further noted that its rates are constrained by “competition” and by “the customers it serves, which are largely sophisticated customers, including wireless carriers that are well aware of the existence of competitive alternatives.”³⁴ Charter made a similar point that its customers, including wireless providers, “exercise significant leverage in contract negotiations...making it impossible for Charter to dictate terms.”³⁵

No commenting party contended that non-incumbent rates are not just and reasonable. Verizon, which proposed that the Commission extend *ex ante* rate regulation to all providers in non-competitive areas, in fact explained that “competitive providers would be expected to match or undercut” regulated rates to attract customers.³⁶ Birch *et al.*, which called for the Commission to impose *ex ante* rate regulation on the single leading competitor in non-competitive markets, provided no evidence that rates charged by non-incumbents in these or any other markets are unjust and unreasonable. ACA finally notes that nowhere in the FNPRM does the Commission provide evidence, including by reference to its data collection or analysis submitted by incumbent LECs or competitive providers, or otherwise contend that rates of non-incumbents are not just or reasonable in any geographic market.

³³ Cox Comments at 19-20.

³⁴ *Id.* at 20.

³⁵ Comments of Charter Communications, Inc. WC Docket Nos. 16-143 *et al.* at 12 (June 28, 2016) (“Charter Comments”).

³⁶ Verizon Comments at 17.

V. THERE ARE NO GROUNDS FOR THE COMMISSION TO PRECLUDE NON-INCUMBENT PROVIDERS FROM THE OPTION OF OFFERING BDS-LIKE SERVICES ON A PRIVATE CARRIAGE BASIS

As a general matter, providers of any type of telecommunications are recognized to have the right to offer such telecommunications on a common carrier or a non-common carrier (private carrier) basis.³⁷ Thus, it is surprising that the Commission, without prologue or discussion, declares in the FNPRM, that BDS “are telecommunications services regardless of the provider supplying the service” and that providers of BDS are common carriers.³⁸ The only hint of explanation for this statement is the Commission’s perception that “the record” suggests that, as a factual matter, providers of BDS have chosen not to offer BDS on a private carrier basis. However, the Commission has not properly laid the groundwork for such a factual finding because, as NCTA notes, “the issue had never been raised in this proceeding” – or any other proceeding for that matter.³⁹

The comments offered in response to the Commission’s declaration leave no doubt that cable and other providers make many BDS-like offerings available on a private carrier basis, choosing with whom, when, and on what terms to offer the BDS-like telecommunications.⁴⁰ It is ACA’s understanding that many of its members also have provided and continue to provide BDS-like services on a private carriage basis, meeting each prong of the private carriage

³⁷ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F. 2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (*NARUC I*).

³⁸ See FNPRM, ¶ 257. The FNPRM notes that this definition is consistent with the recommendation of INCOMPAS and Verizon.

³⁹ See *also* NCTA Comments at 14 (“The Notice...simply assumes that competitive BDS is a common carrier service subject to Title II of the Act, because, it claims, there are no assertions to the contrary in the record. This assumption is wholly unwarranted...because the issue had never been raised in this proceeding.”); FNPRM, ¶ 263.

⁴⁰ See *e.g.*, Charter Comments at 17-20; Comcast Comments at 15-17; NCTA Comments at 11-15.

definition.⁴¹ Indeed, the Commission itself seems to recognize that BDS-like offerings are not universally provided on a common carriage basis, citing filings from two incumbent providers that they have offered BDS on a private, non-common, carriage basis.⁴² To the extent the “record” appears to have a dearth of information about providers’ private carrier BDS-like offerings, it is because the Commission never sought to generate that record. Nor did it seek to do so in the FNPRM.

If the Commission, by way of the declaration described above, either purported to classify all BDS-like offerings as telecommunications services or attempts in any order based on the FNPRM to do so, ACA joins with numerous parties to oppose any effort to require offerings that meet the proposed BDS designation be offered solely as telecommunication service and a provider of BDS to be by definition a common carrier.⁴³ As an initial matter, the Commission completely bypasses the requirement that declaring a service, by definition, is a telecommunications service would be a rule requiring proper notice and an opportunity for comment as per the Administrative Procedure Act. If the declaration in the FNPRM is intended as such a determination, it was unlawfully adopted without notice and opportunity for comment.⁴⁴ The FNPRM itself does not propose that it make such a finding but presumes, inexplicably and improperly, that such a determination has already been made.⁴⁵ In short, the FNPRM is not adequate notice that the Commission is considering making a finding that BDS-

⁴¹ See *NARUC I*.

⁴² FNPRM, n. 671.

⁴³ See e.g., NCTA Comments at 11-15, Charter Comments at 17-20, Comcast Comments at 15-17.

⁴⁴ Accord NCTA Comments at 13-14; Comcast Comments at 67.

⁴⁵ Paragraph 263 of the FNPRM is not a proposal that BDS be deemed a telecommunications service. Rather, it assumes that it is and then proceeds to discuss applying Sections 201 and 202 as the means by which price regulation may be imposed on BDS providers.

like services are always telecommunications services; instead that assumption is the basis by which the Commission makes proposals how to regulate BDS-like offerings.

Assuming *arguendo* that the classification issue was properly noticed, the Commission should not declare all BDS-like offerings to be telecommunications services by definition. The law permits providers, except in exceptional instances, to decide how to offer a service – as a telecommunications service offered on a common carrier basis, or it could be telecommunication offered on a private carriage basis.⁴⁶ The Commission cannot require BDS-like services to be treated as telecommunications services regardless of a carrier's intent to offer them on a private carrier basis simply to further some public interest objective.⁴⁷ That a provider should be able to make that choice reflects the nature of BDS-like offerings themselves as provided by non-dominant providers in particular. As the Commission itself notes, BDS is far

⁴⁶ See e.g. Brief for Respondents, *United States Telecom Association, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents* (USCA Case #15-1063) at 81 (filed Sept. 14, 2015) (“USTelecom asserts that broadband providers ‘have the right to elect whether to operate as private carriers or common carriers.’ Br. 75. If a provider in the future decides not to make a standardized, mass market offering of broadband service to the public, but instead opts to offer service as private carriage on individualized terms, it would no longer be offering ‘Broadband Internet Access Service’ as defined in the *Order* and would not be subject to the legal standards adopted here.”). ACA agrees with the Commission’s statement and submits that it applies equally to BDS and BDS-like services.

⁴⁷ See e.g., Charter Comments at 19, citing *NARUC I* (“Whether ‘[a] particular system is a common carrier’ is determined ‘by virtue of its functions, rather than because it is declared to be so...The D.C. Circuit long ago ‘rejected...an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goal it seeks to achieve.’”). See also Letter from Curtis Groves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 et al. (Aug. 5, 2016) (“Verizon *Ex Parte*”). In this filing, Verizon claims that “cable providers sell Business Data Services the same way everyone else in the industry sells Business Data Services, and that the way they offer it is common carriage.” Verizon provides no proof for this assertion. Moreover, Verizon is incorrect. Certain cable operators today have chosen to provide BDS-like services without holding themselves out to provide such services indifferently to the public or, as discussed herein, engaging in other activities that would indicate they are common carriers. Verizon also states that “the Commission has long held that Ethernet is a telecommunications service.” First, Ethernet is a technology. Second, Ethernet technology can be employed to provide a wide array of services, including BDS-like services provided by cable operators. Third, if Verizon is providing Ethernet-based BDS and holding itself to provide such service indifferently to the public, ACA agrees it is providing a telecommunications service. But, this is not evidence that all providers of BDS-like services hold themselves in a similar, indiscriminate manner.

from a homogenous service. BDS-like service “comes with substantial reliability guarantees and functionality” that are tailored to individual commercial and carrier customers.⁴⁸ Providers also often need to provide a specific package of BDS to meet the varying needs of customers, both retail and wholesale customers, to connect at different sites.⁴⁹

The Commission’s observation that BDS services are frequently designed for the customer is supported and elaborated upon in the comments of many parties. As just one example, Comcast explains that its customers have “different BDS needs in terms of type of connections, bandwidth speed, etc. and these customized premium-priced options are typically contractually backed by specific service level agreements.”⁵⁰ It is for that reason that competitive providers either do not have posted prices for BDS or, if they do, use them to initiate a negotiation to adopt a specific contract. “Off the rack” pricing and terms for homogenous services, while perhaps sufficient in many situations, is often not what sophisticated customers demand, and, as a result, competitive providers offering BDS often do so on a private carriage basis.⁵¹ As NCTA noted, “[a]ll of these characteristics are consistent with private carriage status as delineated in *NARUC I* and *Norlight*.”⁵²

Only where telecommunications is offered in a situation where the provider has market power might the Commission consider requiring that it be offered on a common carrier basis. But even in that situation, as Comcast notes, the Commission has not been quick to do so,

⁴⁸ See FNPRM, ¶ 194 (where the Commission discusses at length Sprint’s special requirements for its wholesale Ethernet service). See *also id.* ¶ 200.

⁴⁹ *Id.* ¶ 201.

⁵⁰ Farrell Declaration, ¶ 74.

⁵¹ See NCTA Comments at 11. NCTA also notes (at 13) that the “*NARUC I* instructs that the Commission does not have ‘unfettered discretion’ to confer or not confer common carrier status.” *Id.*

⁵² *Id.*

which underscores the high hurdle the Commission would face were it to properly notice the issue as a possible new rule. Here, ACA and others have demonstrated as a general matter that, in non-competitive markets, non-incumbent providers do not have market power in the provision of BDS services, and it is not justifiable to impose pricing regulation on them should they offer their service on a common carrier basis. It follows that it would be even less justifiable to require all BDS-like offerings be made on a common carrier basis in both competitive and non-competitive markets.⁵³

Only a few commenting parties seek to require BDS providers to be common carriers. Birch *et al.* aver that because BDS customers “rely on these services for some of their most important and sensitive operations,” and because any test to determine whether markets are competitive will not be “perfect,” all providers should be subject to Title II obligations.⁵⁴ These arguments, however, should carry little, if any, weight. First, Birch *et al.* ignore the clear precedent that the Commission can only consider to impose common carrier obligations on an otherwise private carrier where it has market power, not to further policy goals. The proposal of Birch *et al.* would, in effect, put the Commission in the reversible position of requiring common carriage simply to advance some broader public interest objective, which the courts have said the Commission may not do.⁵⁵ In short, the reasons proffered by Birch *et al.* are legally insufficient to deem all providers of BDS to be common carriers, *e.g.* they do not even begin to demonstrate that cable or other competitive providers of BDS have market

⁵³ If anything, determinations whether there is sufficient market power to impose common carrier obligations on an otherwise private carrier of BDS need to be made on a case-by-case in non-competitive markets, rather than a generic basis, taking into account the particular characteristics of the market and determining whether the provider has market power.

⁵⁴ See Birch Comments at 38-39.

⁵⁵ See n. 37, *supra*.

power.⁵⁶ Second, Birch *et al.* produce no evidence that commercial customers are not having their operational needs met by private carriers. In fact, cable operators, as well as other providers, already work with their BDS customers to fashion customized agreements to protect critical operations. Finally, Birch *et al.* fail to address a key concern that common carrier regulation is costly and limits the flexibility of providers to tailor services to meet the needs of their customers.

Verizon also seeks to have all BDS providers offer service as common carriers because not doing so would otherwise “confer unfair competitive advantages and distort the marketplace.”⁵⁷ Verizon’s position apparently stems from a view that all BDS providers offer “comparable services.” However, BDS providers do not consistently offer what might conceivably be “comparable service,” but services that vary greatly and are frequently customized for the needs of individual customers. Again, private carriers will incur compliance costs if they must now operate as common carriers under a generic Commission rule. Verizon suggests that this concern could be met by not regulating entrants for some period, but simply delaying the imposition of regulation will still produce uncertainty and is far from cost free. It may serve Verizon’s interests as an incumbent to have its competitors subjected to increased regulatory burdens, but that would inhibit the development of competition. Accordingly, the Commission has neither a sufficient record to support declaring that all BDS-like offerings must

⁵⁶ Indeed, where, for a given type of service, here BDS, whatever trigger the Commission ultimately adopts to determine whether markets are non-competitive, justifying that incumbents should be price regulated (putting aside the question whether any other market participants should also be fully regulated – which they should not), and some markets are competitive, it logically follows that the providers of that service do not inherently have market power. Consequently, a finding that BDS must be provided on a common carrier basis in all cases in all markets on the basis of market power – which is the only basis for dictating that all BDS are telecommunications service – cannot be justified.

⁵⁷ Verizon Comments at 18. See also n. 47 *supra.*, where ACA rebuts Verizon’s contention that cable operators providing BDS-like services offer it in the same manner as BDS providers and therefore should be regulated as common carriers,

solely be offered as a telecommunications service, where providers would be regulated as common carriers, nor a proper notice to allow it to consider the classification issue in this proceeding. Furthermore, apart from these shortcomings, there is no basis for concluding in this or any proceeding that any private carrier of BDS-like services has market power and must be compelled to offer its BDS-like services as telecommunications service.

VI. IMPOSING REGULATION ON NON-INCUMBENT PROVIDERS OF ETHERNET SERVICES TO COMMERCIAL CUSTOMERS IS EFFECTIVELY A TAX THAT WILL INHIBIT INVESTMENT, INNOVATION, AND COMPETITION

In its initial comments, ACA explained that cable providers typically need to deploy new fiber connections to provide BDS and this is a risky financial undertaking.⁵⁸ The FNPRM shares this view, and it discusses at length that non-incumbent providers, including cable providers, face significant barriers in deploying networks to provide BDS and challenging incumbent LECs.⁵⁹ These barriers include the need to invest in and build networks to scale to lower per unit service costs and to obtain rights from government to access rights-of-way and from building owners to access their facilities. Moreover, unlike the incumbent LECs which had exclusive franchises for almost a century, non-incumbents must compete to sign up each new customer. As a result of all these barriers, cable providers and other non-incumbents find the economics of the BDS business to be challenging.⁶⁰ Joseph Farrell, in his Declaration, remarks that “a substantial amount of potential entry is close to the margin of profitability.”⁶¹ In other words, establishment of additional barriers to entry can easily thwart competition. That would

⁵⁸ ACA Comments at 39-41.

⁵⁹ FNPRM, ¶¶ 224-236.

⁶⁰ See e.g., Charter Comments at 8 (“cable providers’ competitive position is still tenuous”).

⁶¹ Farrell Declaration, ¶ 22. Dr. Farrell discusses at length in his Declaration (¶¶ 96-102) how “price regulation would negatively affect entry incentives.” For instance, he states (¶ 99), “[i]n particular, in alignment with economic common sense, Comcast’s description of its own entry decisions indicates that price regulation will affect its entry decisions (via projected revenues).”

be the case should the Commission impose a new tax by regulating the rates of non-incumbents.⁶²

Among the additional costs of the Commission's proposed *ex ante* rate regulation regime, where BDS Ethernet rates are benchmarked to comparable ILEC price capped TDM rates, are the administrative costs of determining what should be the proper rate by service and geography. Again, monthly recurring rates and non-recurring rates vary, even for the same service within the same geography, and they are dynamic as customers demand new assurances, functionalities, and terms. Moreover, the Commission intends to lower incumbent LEC TDM rates annually, causing non-incumbents to adjust their Ethernet rates to ensure comparability. Further, non-incumbents would need to keep track of different prices for multi-location customers operating in competitive and non-competitive areas. And, of course, non-incumbents would need to be prepared to deal with the threat of Section 208 complaints and additional litigation.⁶³ All of these costs would fall hardest on smaller non-incumbent BDS

⁶² One ACA member stated that should the Commission impose rate regulation it would "change the game" for its whole business model." ACA Comments at 39.

⁶³ The burdens discussed in this section touch on only some of the costs of rate regulation and are not exhaustively treated. As just one example of potential burdens, one proponent of rate regulation, Level 3 Communications, avers that the Commission's proposal to use benchmarks would be "highly intrusive" for providers. See Level 3 *Ex Parte* at 4. Level 3 Communications, which along with Birch proposed regulating the rates of "leading competitors" – a proposal opposed by ACA for the reasons set forth herein – also explained at length its concerns with regulating "non-leading competitors" in non-competitive areas. *Id.* at 7 ("[I]f the Commission were to impose *ex ante* rate regulation on non-leading competitors, it is likely that a complaint process would have a greater deterrence effect on such competitors as compared to the effect on leading competitors. Smaller competitors are less likely to have the resources to participate in a complaint proceeding and are more likely to be concerned about the reputational harm associated with an adverse Commission decision. Thus, the complaint process would likely cause non-leading competitors to charge prices at or below a benchmark rate even if the leading competitor would feel free to charge rates above the benchmark rate...the non-leading competitor would face a substantial disincentive to deploy facilities to compete at that location at all"). These concerns are consistent with those expressed by ACA in its initial comments and herein about imposing any regulation on non-incumbents.

In addition, proponents of regulation are not satisfied with *ex ante* regulation and contend much more extensive regulatory intervention, more akin to traditional rate regulation, will be required. For instance, as discussed in n. 3, *supra*, some of these proponents insist that rate regulation cannot be effective without requiring the filing of tariffs, which, if required by the Commission, would greatly increase burdens

providers because they have more limited resources and generally do not have in-house regulatory counsel.

Various commenters elaborated on the harmful effects of regulating the rates of non-incumbents:⁶⁴

Charter Communications – “Given the already steep hurdles Charter faces to expand its BDS business, and in light of the Commission’s goal to promote facilities-based competition into new areas, the Commission should be loath to expand price regulation to non-dominant providers. This would only create disincentives for cable providers to undertake further investment.”⁶⁵

Cox Communications – “Every decision to deploy fiber entails risks – there is risk in the construction cost estimates, risk in the speculative assumptions about service demand, risk in the ongoing operating cost of a particular network, and risk in keeping a customer for the expected duration of the contract. The pricing uncertainty introduced by this proceeding erodes

on non-incumbents. Additionally, while proposing to use price caps and benchmarks as interim solutions, Windstream has “urged the Commission to continue to work toward true comprehensive reform based on a cost-based approach to setting benchmark prices in non-competitive markets” by using “a modified version of the Connect America Cost Model.” Windstream contended this model can provide “an important reference point” assuming “ILECs respond to competition on a building-by-building basis.” See Windstream *Ex Parte* at 8. For non-incumbents, having to deal with such regulation would be a “nightmare.”

⁶⁴ See also, e.g., Farrell Declaration, ¶ 111, where he discusses that rate regulation of non-incumbents, by deterring their entry, would harm not only the customer seeking service but other potential customers as well since network deployments “bring the entrant closer to being able to serve other customers;” and Lightower *Ex Parte* at 2 (“Lightower explained that it believes that rate regulation if applied to it and similar competitive fiber providers would increase risk and uncertainty and result in less capital deployed to building competitive fiber networks, resulting in less competition...Lightower also noted that lenders have expressed concern at the possibility of regulation of Lightower’s prices, indicating that it increases the risk from the lender’s point of view and therefore increases Lightower’s cost of capital.”).

⁶⁵ Charter Comments at 10. Charter continued by noting that even if the regulatory regime enabled it to earn a sufficient return, “price regulation would create significant regulatory uncertainty that in itself would discourage investment.” *Id.*

the confidence that Cox historically has exhibited regarding the likelihood it will achieve a positive return on investment.”⁶⁶

In contrast to these comments, no party alleged that the imposition of rate regulation on non-incumbents would not deter investments by competitive providers in BDS infrastructure and services. In fact, Verizon implicitly acknowledges non-incumbents could be harmed by proposing to delay regulation for firms just entering non-competitive markets.⁶⁷ This harm becomes even more troubling when juxtaposed with the evidence that regulating non-incumbents would produce no demonstrable benefits.

VII. THE COMMISSION SHOULD SEEK TO CREATE ROBUST COMPETITION FOR ETHERNET SERVICES BY ESCHEWING RATE REGULATION OF NON-INCUMBENTS AND FOCUSING ON REMOVING BARRIERS TO INVESTMENT AND DEPLOYMENT

In seeking to establish a rate regulation regime in non-competitive markets, the Commission set forth a variety of options, but no rules, and asked hundreds of questions. Clearly, imposing rate regulation is a daunting task, and a variety of commenters explained at length why the Commission could not successfully regulate BDS prices, especially for Ethernet services and particularly in the near future. For instance, in making his declaration on behalf of Comcast, Joseph Farrell explained, “[b]ecause BDS costs vary by location, and because BDS customers demand customized BDS products...efficient price regulation would be extremely

⁶⁶ Cox Comments at 22. Cox also declared that the Commission’s proposal to regulate its rates could reduce its provision of E-Rate services. *Id.*

⁶⁷ Verizon Comments at 20. See also Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (Feb. 18, 2015) (“We stated that not only would Title II reclassification be unlawful, but it would also be a radical and risky change to light-touch regulatory policy that has been pursued on a bipartisan basis for the last two decades and that has encouraged massive private investments in broadband infrastructure. The record...is clear: heavy regulation reduces incentives to invest in communications networks...On the flip side, shifts away from heavy regulation consistently have increased incentives to invest.”); Level 3 *Ex Parte*, n. 63 *supra*.

difficult to implement.”⁶⁸ Large purchasers of BDS also highlighted the challenge of regulating rates, even while asking the Commission to impose rate regulation: “[I]t should be obvious to even the most optimistic observer that the path to fundamental reform in this market will require substantial additional time and resources, even without taking into account the reconsiderations, further notices of proposed rulemaking, and judicial appeals that fundamental reform inevitably attracts.”⁶⁹ Even Verizon and competitive providers that are proponents of broader regulation did not settle on a single rate regulation regime,⁷⁰ which means it will almost certainly take years to adopt and implement regulations (even assuming they can work⁷¹). The Commission has

⁶⁸ Farrell Declaration, ¶ 62. See also Lightower *Ex Parte*, Attachment at 7 (“Lightower sells complex solutions – not circuit elements around which traditional rate regulation is based. Resolving a complex solution into rate regulation piece parts and categories adds no value to the customer and creates another layer of uncertainty for Lightower.”) and 8 (“Regulation of Competitive Fiber Providers is Impractical”); Lightower *Ex Parte* at 2 (“Lightower further explained that its service often include multiple service types and, may cover service areas of more than one LEC, and that complying with rate regulation would be extremely problematic.”).

⁶⁹ Ad Hoc Comments at 6. See also *id.* at iii, where these purchasers insist that rate regulation cannot be accomplished merely by having a establishing price caps but will require tariffs since “price cap rules do not dictate what rates the ILECs can charge.”

⁷⁰ See e.g., Birch Comments at 12 (“price caps appear to be the appropriate means of applying *ex ante* rate regulation to PBDS.”), Sprint Comments at 66 (proposing that “the Commission ... not establish absolute caps for [PBDS] prices, but instead designate safe harbor prices that are presumptively just and reasonable.”), and Verizon Comments at 22 (“After gathering information on the rates charged on non-competitive areas in each ILEC territory and for each type of Ethernet service, the Commission should subject these rates to a one-time, across-the-board reduction to derive the benchmark rates.”). See also Letter from Maggie McCreedy, Vice President, Federal Regulatory and Legal Affairs, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission WC Docket No. 16-143 *et al.* (Aug. 5, 2016), in which Verizon discusses further its proposed methodology to establish rate benchmarks for BDS provided by incumbents and affected non-incumbents in non-competitive areas. Verizon proposes to base these benchmarks on price cap carrier prices. However, as discussed herein and as the record indicates, prices for BDS services provided by non-incumbents vary greatly depending on the features and functionalities and the terms and conditions a customer wants. Therefore, the application of Verizon’s proposed benchmarks to non-incumbents would be predicated on a factually incorrect premise – that BDS services are offered according to standard terms and conditions – and would be arbitrary and capricious. Moreover, for these same reasons, a price cap benchmark regime could lead to situations where a customer is unable to get the BDS service it wants, with the features and functionalities that it wants, from a non-incumbent provider, despite the non-incumbent’s willingness to offer the service at reasonable rates, depending on what the incumbent offers in the geographically-relevant area.

⁷¹ See e.g. Farrell Declaration, ¶ 64 (“It is telling that while the Commission disclaims any intent to force prices for significantly different product bundles to be the same or to bear simplistic relationships to one another, its proffered example of how it might export TDM price regulation to packet-based BDS is

already wandered in the “desert” of whether and how to regulate BDS for at least two decades. Given the task it has set forth, this proceeding is bound to continue indefinitely if the Commission proceeds on the course proposed or considered in the FNPRM.

Yet, ACA submits there is a better and more immediate way to advance BDS competition: the Commission should use its authority to facilitate additional entry (investment).⁷² First, the Commission should recognize that its non-dominant carrier regulatory policy has contributed significantly to entry by cable and other BDS providers. Given current growth rates for cable and other BDS providers and assuming the Commission will not regulate their rates, they should double their market presence in just four years, and quadruple it in eight. Second, the Commission can accelerate investment by competitors by lowering barriers to deployment, such as by ensuring competitors have access to multi-tenant environments at reasonable rates, terms, and conditions, by adopting a “one-touch” make ready process for attachments to poles, and by requiring cost-based access to public rights-of-way. Finally, the Commission should reduce paperwork and other compliance requirements, which can be disproportionately costly for smaller BDS providers. To that end, ACA appreciates that the Commission is considering excluding smaller providers from complying with its proposal to require BDS providers to submit

strikingly simplistic.”), ¶ 66 (“While benchmarking, or anchoring prices from one customer’s experience to another’s, is thus likely to be ineffectual or dangerous, the alternative of picking a price based on a cost model or other information on costs is also very challenging.”), and ¶ 67 (“the attempt to set a price for a given product in a given market that covers the lower cost and undercuts the second-lowest cost seems doomed to amount to shooting at a narrow, moving, and occluded target in such locations.”).

⁷² See *id.*, ¶ 61, citing Jeremy Bulow and Paul Klemperer, “Auctions Versus Negotiations,” *American Economic Review* 86 at 180, n. 1 (1996), (“optimal regulation of an industry may be less important than attracting additional entry’ – a view consistent with modern consensus interpretations of our experiences with regulation and competition.”). See also, Tariff Investigation Order, ¶¶ 102-140, where the Commission recognizes the value of promoting entry by finding it illegal for incumbents to impose tariff provisions that effectively bar customers from moving traffic to competitors.

market data every three years.⁷³ Regardless of the merits of data collection, smaller providers found the previous data collection to be extremely burdensome and expensive, because, among other reasons, most do not have personnel dedicated to regulatory compliance and most do not regularly maintain data the Commission sought. In response to the Commission's inquiry on the appropriate threshold to determine who is a smaller provider, ACA proposes that the Commission exempt any provider that has BDS revenues that are less than two percent of total annual revenues BDS revenues (approximately \$45 billion⁷⁴).

VIII. CONCLUSION


At the outset of the FNPRM, the Commission stated that “competition is best.” ACA agrees. The corollary is that regulation should be employed only where it will produce outcomes better than the market. Given the “great success” of cable providers' entry into the BDS market, given that the Commission should want cable and other non-incumbents to accelerate their pace of their BDS investments, and given the cost of regulation, the Commission has no basis to reverse course and regulate the rates of these and other non-

⁷³ FNPRM, ¶¶ 524, 525-527.

⁷⁴ *Id.* ¶ 81.

incumbents in non-competitive markets. Rather, the Commission should “double-down” and focus on facilitating additional entry.

Respectfully submitted,

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